United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1027

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

UNITED STATES OF AMERICA,

Appellee,

- against -

MILTON PARNESS and BARBARA PARNESS,

Appellants.

- -

REPLY BRIEF FOR APPELLANTS

This brief is submitted by the Appellants in reply to misconceptions in the Government's Brief dealing with the significant constitutional, statutory and factual matters here at stake.[1/]

At the oral argument of April 8, 1974, the Government attorney responded to a question by Judge Friendly by taking the position that a "pattern of racketeering" would be made out by the mailing of two (fraudulent) letters on the same day.

1/ Appended to this brief is a sampling of the variety of factual misstatements in the Government's Brief.

The Government attorney, however, overlooks the clear Congressional intent, as expressed by Representative Poff, that the "pattern" of racketeering activity means "at least two independent offenses forming a pattern of conduct" 116 Cong. Rec., Part 26, p. 35193 (Oct. 6, 1970). Webster New International Dictionary, Second Edition among other things defines pattern as meaning to copy or to imitate. The word pattern connotes an intentional, regular, or repeated activity. Cf. United States v. Hunter, 459 F. 2d 205, 217 (4th Cir. 1972)

Surely the evil sought to be attacked by Sections 1961 et. seq. was the infiltration of America's legitimate businesses by the underworld through the investment of its ill-gotten gains realized by its regular, recurrent and consistent violations of the law. We respectfully submit that the alleged "acts of racketeering" in this case like the example of the two letters posed by Judge Friendly was not the type of conduct that Congress contemplated in enacting this legislation.

Similarly, with respect to the question raised by Judge Timbers regarding the nature of the "enterprise", we again refer to the Congressional intent. The legislators who spoke out vigorously for passage of the Act unanimously voiced their concern for our domestic enterprises. (pp. 25-26, Appellants main brief)

The Government has here cited no Congressional expression of concern for enterprises that are formed and remain under the control of a foreign sovereign.

Judge Timbers raised the question of whether the American contacts with Hotel Corp. is not a prime concern in determining whether the Act should reach that enterprise. The answer to that question must start with a recognition of the general premise that, in dealing with the scope or purpose of a law, "All legislation is prima facie territorial," as Justice Holmes noted in American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909). And to overcome that prima facie premise, as the decisions respecting the territorial scope of the Labor Management Relations Act show, there must at least be a clear congressional mandate to extend the statute in question to the objects of the legislation that are extraterritorial in nature. As explained in the recent Windward Shipping decision of the Supreme Court, 42 Law Week 4234 at 4236, without a clear legislative expression, courts must not apply a domestic statue "willynilly into the complex of considerations affecting foreign trade."

The Supreme Court in one of the analogous Labor Act decisions, McCulloch v. Sociedad Nacional, 372 U.S. 10 at 18-19, rejected a "balancing of contacts" approach to the question whether that Act as written was intended to apply to a foreign vessel upon which a labor dispute occurred while in an American port.[2/]

2/ In the McCulloch case, for example, the Honduran corporation that owned the vessels was wholly owned by United Fruit Co., a New Jersey corporation. United Fruit Co. in turn was owned by American citizens and had its principal office in Boston. Its business was to cultivate, transport and sell produce, raised in Central and South America, for consumers in the United States. The vessels owned directly or indirectly by United Fruit Co. operated in a regular course of trade between foreign ports and American ports.

Courts should not, said the McCulloch opinion (p. 19), apply the sanctions of the Labor Act to foreign-flag ships "on a purely ad hoc weighing of contacts basis." Rather, to sanction the exercise of American sovereignty over an enterprise or vessel of a foreign nature, "there must be present the affirmative intention of the Congress clearly expressed." Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957).

And so in the instant case, we must look not to the degree of amount of contacts with the United States that can be tied to the Netherlands Antilles enterprise. Since the enterprise is the object, or the crux, of the Section 1962(b) provisions[3/], the only relevant inquiry is whether Congress has made an "affirmative intention... clearly expressed" that Section 1962(b) be extended extraterritorially to cover enterprises organized and operating in foreign lands. No such affirmative declaration is here present.

The Government's Brief (Point III, pp. 21-26) concedes that there was no direct evidence that the $160,000 which Parness caused to be loaned to Goberman, to pay off his debt to Holzer, was stolen or converted. There was, in other words, no direct proof of any violation of Section 2314, a violation that was the predicate to a violation of Section 1962(b).

All that was proved at trial, the Government's Brief now says (p. 22), was that "Parness was situated in a position in which he could

---

3/ There would be no purpose for this legislation but to focus on the enterprise. There are countless laws on the books which punish those who only steal, convert, take by fraud or transport contraband in interstate commerce.

have stolen or converted over $350,000." (Emphasis added.) As if to emphasize this devastating lack of direct proof, the brief reiterates (p. 22) that the Government only "established Parness' capacity to have stolen or converted the $160,000 which he loaned to Goberman." (Emphasis added.) Proof that Parness was in the position to steal, or had the capacity to steal, is certainly not proof that he did in fact steal or convert the $160,000.

Moreover, the Government does not even claim that there was proof that the $160,000 or any other amount was even missing, let alone stolen. There is, in short, no evidence of what might here be called the corpus delicti -- the missing or stolen $160,000.

Without some proof that the $160,000 was at least missing, the Government's effort (Brief, pp. 22-26) to show circumstantial evidence that Parness must have stolen or converted the $160,000 becomes incredible and impermissible. Circumstantial evidence concededly can be utilized to show that a particular person committed a crime. But circumstances are not usable to show that a particular individual must have exploited his capacity to commit an offense to the point where an unproved offense did in fact occur.

A jury, for example, would not be entitled to infer proof of guilty knowledge and intent merely on the basis that circumstantial evidence would indicate such crucial elements. United States v. Clark, 475 F.2d 240 (2d Cir. 1973); United States v. Fields, 466 F.2d 119 (2d Cir. 1972). Here, these convictions cannot stand absent proof (1) that

$160,000 belonging to Hotel Corp. was missing, (2) that Parness stole or converted the $160,000, and (3) that the stolen or converted $160,000 was transported in interstate commerce on February 4 and 9, 1971.

It must be noted again that the Government conceded that Parness transmitted hundreds of thousands of dollars to Hotel Corp., and the Government never knew, proved or attempted to prove how much Parness collected, or withheld from Hotel Corp. (40a, 43a)

The complete absence of direct proof and the complete absence of relevant circumstantial evidence combine to drain this conviction of any evidentiary support. In such a situation, the conviction of both Appellants must be deemed a violation of their constitutional due process rights. See United States v. Ramirez, 482 F.2d 807, 814-815 (C.A.2d, 1973), citing Garner v. Louisiana, 368 U.S. 157 (1961), and Thompson v. City of Louisville, 362 U.S. 199 (1960).

The ultimate confession by the Government that it did not prove, either directly or by circumstantial evidence, that $160,000 was either missing or stolen is found in its frantic last-minute effort at the trial to shift the focus of the theory of the crime from a stealing to a withholding of access to the money. Again, it is significant that the Government's Brief now makes only passing references to this phenomenal shift in theory (see Gov't. Brief, pp. 21 at note **, 28), a matter which was developed at some length in Appellants' opening brief (Point III, pp. 52-60).

The inability of the Government to defend this shift in theory became even more evident at the oral argument before this Court on April 8, 1974, when Government counsel was unable to point to any portion of the indictment that alleged the theory of the crime that was submitted to the jury. Indeed, until the Government's summation to the jury, there is not one piece of paper in the entire record and not one bit of testimony at trial that even intimates that Parness was chargeable with, or responsible for, Goberman's alleged inability to use the bank account of Hotel Corp.[4/] -- an inability that was never proved. Goberman's one reference to his relations with the bank was not received for the truth. Can a conviction stand on total absence of proof?

We cannot overemphasize the fact that the new theory as well as the theory contained in the indictment was submitted to the jury by the Court. The judge charged:

> "As I understand it the Government is contending that Mr. Parness collected money due on the markers from the junketeers or the gamblers but did not remit these amounts to the hotel. Or, if he did remit them, Mr. Goberman was denied their use"(615a). (Emphasis added.)

Indeed, after the trial -- when the Government's summation with its change in theory could be dealt with for the first time -- we affirmatively established that Goberman remained an authorized signatory

---

[4/] If Goberman was having trouble with the Bank of Nova Scotia it might have been due to the fact of his extensive criminal record (214a), his failure to make payments on the $1,500,000 he borrowed from that bank (476-7a), his failure to make payments on the $1,500,000 he borrowed from the Netherlands Antilles Government (472a), or his two pending bankruptcies (150a, 226a).

on Hotel Corp.'s bank accounts until the accounts were closed. The signature card (705a) -- the only one which the bank maintained (660a) -- contains no restriction on Goberman's ability to sign alone.

Goberman was the "managing director" of Hotel Corp. until July 1971 (351a) -- months after the Government claims he was ousted from control over the assets and funds of Hotel Corp.[5/]

In April 1971 -- months after allegedly losing control -- Goberman alone, as managing director -- without anyone else's signature -- signed for a $250,000 mortgage binding Hotel Corp. and used the funds to pay an old debt of one of his corporations. (716a-724a)

Finally, the record shows that for each of the months of March, April and May 1971, Goberman -- alone -- drew checks to himself of $1,000 against Hotel Corp.'s accounts (713a, 714a, 715a). Would Goberman continue to draw checks if he couldn't negotiate them?[6/] Appellants' motion for a new trial was predicated, among other things, on the factors referred to above.

Two final factual comments are required in light of the Government's oral argument. First, contrary to the Government attorney's claim, the indictment does not charge nor does the proof show that the $350,000-$400,000 allegedly "stolen, converted or taken by fraud" was

---

5/ Under Antillean law, the "managing director" of a corporation has the power to do anything the executive officer of any corporation would have the power to do (375a-376a).

6/ The Government, in its motion papers in opposition to appellants' post-trial motions, represented that the back of the checks -- where endorsements usually are found -- were never available.

in excess of the "hundreds of thousands of dollars" conceded by the trial prosecutor to have been transmitted by Parness.

Second, the Government attorney continuously referred to "organized crime" during his argument. The proof at trial is completely devoid of any suggestion that Parness is a member of "organized crime" or that "organized crime" was involved in the transactions in this case.

Respectfully submitted,

ROY M. COHN
Attorney for Appellants
39 East 68th Street
New York, New York 10021

Tel.: 472-1400

EUGENE GRESSMAN
MICHAEL ROSEN

Of Counsel

APPENDIX

We are sufficiently sophisticated not to take umbrage at the usual percentage of misrepresentations of the record in the appellee's brief, particularly when the author was not the trial prosecutor. Nor does Mr. Cohn maintain any great degree of sensitivity at the ritualistic personal attack on him, particularly here where it is relegated to a footnote (fn., p. 27, Gov't. Brief). But the attack in this case borders on the ridiculous. Because in summation Mr. Cohn referred to a question by the prosecutor to witness Ida Cohen establishing they had met each other before the trial, and referred to her in the summation as "Aunt Ida," the appellee's brief writer accuses Mr. Cohn of having "asserted what may well have been a false kinship with a witness." Mrs. Ida Cohen, a pleasant elderly lady with a Molly Goldberg charm, was referred to as "Aunt Ida" often during the trial. Indeed, she was referred to as "Aunt Ida" by Judge Bonsal in his charge (596a). Neither Mr. Cohn nor Judge Bonsal was trying to claim "false kinship" and imply that Ida was their aunt. The testimony and record made it abundantly clear that she was Mrs. Parness' Aunt Ida (fn., p. 27, Gov't. Brief)

Just a few of the many other misleading and unfair references are:

Government Brief	Record
1. p. 9 - Goberman heard a conversation between Klavir and Parness concerning a plot against Goberman through ventilating ducts.	1. The Government omits that this was followed by a stipulation by counsel that there does not exist "ventilating ducts" in the wall through which the conversation was allegedly heard. Tr. 1503-1504.
2. p. 9 - Parness threatened Goberman.	2. Jury specifically told the Court that they did not find any threats or coercion. Tr. 1778-1779.
3. p. 11 - Barbara testified that "the $150,000 came from [Levrey] in cash through Milton Parness (Tr. 870)" (Emphasis supplied)	3. Barbara testified that Parness handed her the money and told her it was for Levrey. Tr. 870.
4. p. 21 - Goberman testified that approximately $400,000 was owed to Hotel Corp. from gamblers' debts "which were either uncollected or collected and not remitted (Tr. 460-63, 701)"	4. No such testimony appears at Tr. 460-63, 701.
5. p. 21 - The $400,000 "was over and above the substantial sums which had previously been remitted to Hotel Corp"	5. No such testimony appears in the record. Goberman had no idea how much Parness remitted. Tr. 397; App. 433a.
6. p. 23 - The $60,000 owed by Norber for losses was seized by I.R.S. "before its delivery to Parness. In all probability it was this untimely seizure that forced Parness to use the telltale Olympic "$56,000 check. (Emphasis added)	6. Goberman swore that he was getting the $60,000 owed by Norber. Tr. 476-477; 505a-506a

7. p. 5 - "Olympic's sole function and only source of funds was in connection with arranging junkets and the collection and disbursement of junket front money, air fares and marker collections ... (GX 155)" (Emphasis added)

7. GX 155 shows collections not belonging to Hotel Corp. of women's air fares and men's air fares and commissions earned by Olympic for sending people to the Hotel. It shows disbursements by Olympic from marker collections for air fares and earnings of the junketeers. Payment of Olympic's own operating expenses are also reflected therein.

There is nothing in the record of GX 155 which establishes that all moneys collected by Olympic belonged to Hotel Corp.

8. p. 28 - The Government never alleged that the $40,000 check (part of GX 23) went into Hotel Corp's bank account.

8. Goberman testified on direct:

"Q. The documents in Exhibit 23 show the transfer of [Holzer's] money from your personal account to the Hotel Corporation's account?

A. Yes, sir. ..." (Tr. 49; 95a)